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No. 77-1551

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL COMMISSION ON EGG NUTRITION, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion (Pet. App. 47a-63a) and supplemental opinion (Pet. App. 63a-68a) of the court of appeals are reported at 570 F. 2d 157. The decision and order of the Federal Trade Commission (Pet. App. 1a-46a) are reported at 88 F.T.C. 174.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1977, and was amended on January 23, 1978. On February 17, 1978, Mr. Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 28, 1978. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Federal Trade Commission ordered petitioner, when it makes certain representations concerning the relationship between dietary cholesterol and heart disease, to disclose additional information concerning the controversy among medical experts on the matter. The Commission also ordered petitioner to cease and desist from making certain other representations on the matter. The questions presented are:

1. Whether substantial evidence supports the Commission's determination that the disclosure of additional information is necessary to prevent petitioner's representations from being misleading.

2. Whether the Commission's order is unconstitutionally vague.

STATEMENT

Petitioner is a private, not-for-profit corporation composed of representatives of various egg producers. Petitioner and Richard Weiner, Inc., an advertising agency,[1] caused paid advertisements for eggs to be disseminated in commerce. These advertisements had as their predominant theme a statement that "there is absolutely no scientific evidence that eating eggs, even in quantity, will increase the risk of a heart attack" (Pet. App. 22a). This representation was accompanied by statements that, *e.g.*, there is "overwhelming evidence to the contrary" or "preliminary evidence that the opposite is true" (*id.* at 22a, 27a n. 15). In August 1974 the Commission issued an administrative complaint against petitioner, alleging that these and other representations

[1]Petitioner states (Pet. 3 n. 1) that its "petition is also filed on behalf of Richard Weiner, Inc." Weiner does not appear in the caption of the petition, and petitioner's counsel does not indicate that he is appearing as counsel for Weiner (Pet. 28).

were materially misleading and therefore violated Sections 5 (38 Stat. 719, as amended) and 12 (as added, 52 Stat. 114, and amended) of the Federal Trade Commission Act, 15 U.S.C. 45, 52.[2]

Hearings were held before an administrative law judge, who rendered an initial decision sustaining the allegations of the complaint. The administrative law judge found that there was a substantial body of scientific studies supporting the hypothesis that the ingestion of cholesterol (of which eggs are a major source) is positively related to the incidence of heart disease (the "diet/heart disease" hypothesis), and that those studies "were conducted using scientific methodologies, were performed by competent and highly regarded investigators, have been reported in recognized scientific journals after peer review, and have been generally accepted by experts in the field and by the scientific community" (Pet. App. 11a). In view of those studies the administrative law judge found that petitioner's principal representation—that there is no scientific evidence that eating eggs increases the risk of heart disease—is false and misleading (Pet. App. 9a). The judge also found that petitioner made other false and misleading representations to bolster its message that eating eggs, even in quantity, is not harmful and is in fact positively beneficial (Pet. App. 21a-24a).[3] The administrative law judge recommended the

[2]The Commission applied to a district court under Section 13(a) of the Act, as added, 52 Stat. 114,15 U.S.C. 53(a), for a temporary injunction restraining dissemination of petitioner's advertisements pending completion of the administrative proceeding. The district court denied the injunction, but the court of appeals reversed and directed entry of the injunction. 517 F. 2d 485. This Court denied the petition for a writ of certiorari. 426 U.S. 919.

[3]These included representations that dietary cholesterol is needed by the body for building sex hormones, for transmitting nerve impulses, and for maintaining life in cells; that there is scientific evidence that

entry of an order prohibiting petitioner from making certain representations concerning the relationship between eating eggs and heart disease.

The Commission affirmed the findings of the administrative law judge and, with certain modifications,[4] adopted his recommended order. The Commission recognized that there is some disagreement among scientists about the diet/heart disease hypothesis and stated that it did not intend to choose between the opposing sides (Pet. App. 12a). But it agreed with the administrative law judge that it was "misleading in the extreme" for petitioner to represent that there "is no evidence" to support the hypothesis when in fact there was substantial evidence supporting that hypothesis (Pet. App. 13a).

The court of appeals upheld the Commission's findings and, after modifying it in certain respects, enforced the Commission's orders.[5] The order as modified by the

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avoiding consumption of eggs would increase the risk of heart disease; and that "eating eggs does not increase the blood cholesterol in a normal person" (Pet. App. 21a-23a). Petitioner does not challenge the proscriptions in the order which unqualifiedly forbid the making of these and similar claims.

[4]The administrative law judge recommended that petitioner be prohibited from making any representation tha' eating eggs does not increase the risk of heart disease unless it could demonstrate a "reasonable basis," consisting of competent and reliable scientific studies, supporting the representation (see Pet. App. 28a). Although there is authority supporting that approach (see, *e.g.*, *National Dynamics Corp.* v. *Federal Trade Commission*, 492 F. 2d 1333 (C.A. 2), certiorari denied, 419 U.S. 993), the Commission believed that a less restrictive remedy—permitting such representations as long as they were appropriately qualified—was appropriate in this case and would better accommodate the First Amendment interests in permitting petitioner to present its side of the controversy to the public (Pet. App. 39a).

[5]Petitioner's pr[illegible] argument before the Commission and the court of appeals was that its representations— that there is no scientific evidence supporting the diet/heart disease hypothesis—should not be

court of appeals consists of four parts (Pet. App. 65a-68a). Part A orders petitioner to cease and desist from making certain specific representations, including the representation that there is no scientific evidence that eating eggs increases the risk of heart disease and the representation that dietary cholesterol is needed for building sex hormones, transmitting nerve impulses, and maintaining life in cells.

Part B orders petitioner to cease and desist from advertising "that eating eggs does not increase the risk of heart attacks, heart disease, [etc.]" or from making "any representation concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, [etc.] * * * *unless* it is clearly and conspicuously disclosed * * * that there is a controversy among medical experts concerning the relationship of dietary cholesterol, including that in eggs, to heart disease, and that [petitioner is] presenting [its] side of the controversy" (Pet. App. 67a).

Part C orders petitioner to cease and desist from making representations in advertising concerning the evidence for or against the diet/heart disease hypothesis "*unless* it is clearly and conspicuously disclosed * * * * that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease" (*ibid.*).

Part D orders petitioner to cease and desist from advertising that the evidence supporting the diet/heart

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interpreted literally, but should be interpreted as simply an expression of petitioner's opinion that the existing evidence does not support the hypothesis (see Pet. App. 12a-20a). The Commission rejected that argument as contrary to the common and reasonable understanding of the term "scientific evidence" (*ibid.*), and the court of appeals agreed, stating that "our own finding, if it were our province to make one, would be less charitable to petitioners than that of the FTC" (Pet. App. 56a). Petitioner does not reiterate that argument here.

disease hypothesis is insignificant, that the evidence on the other side is overwhelming, "or otherwise misrepresent[ing] the amount of scientific evidence" on the question (*id.* at 68a).[6]

ARGUMENT

The decision of the court of appeals presents no issue warranting this Court's review. Although petitioner contends (Pet. 10) that there is a conflict between the decision below and *Beneficial Corp.* v. *Federal Trade Commission*, 542 F. 2d 611 (C.A. 3), certiorari denied, 430 U.S. 983, the court of appeals cited and relied on *Beneficial*

[6]The court of appeals' modification of the Commission's order affected Parts B and C of the order. The Commission's order (Pet. App. 44a-45a) had prohibited petitioner from making any representation concerning the relationship (or nonrelationship) of dietary cholesterol to heart disease unless it also disclosed (as Part C of the court's order now requires) that "many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease" (*id.* at 67a). The court of appeals believed that the required qualification would be unnecessarily broad in cases where petitioner did not directly comment on the state of the evidence but merely expressed a view that eating eggs does not increase the risk of heart disease (Pet. App. 66a-68a). The court believed that the statement now required by Part B of the order would be adequate to dispel the deception implicit in a simple representation that eating eggs does not increase the risk of heart disease. Relying on *Beneficial Corp.* v. *Federal Trade Commission*, 542 F. 2d 611 (C.A. 3), certiorari denied, 430 U.S. 983, the court held that the foregoing modification of the Commission's order was warranted by First Amendment principles requiring that a remedy not be broader than necessary to prevent the deception (Pet. App. 62a-63a). The court, however, upheld the Commission's "many medical experts believe" qualification in cases where petitioner comments specifically on the state of the scientific evidence. See Part C of the order (Pet. App. 67a).

The court's initial opinion left it to the Commission to modify its order (Pet. App. 63a). The Commission then submitted a revised order to the court and moved that it be enforced, and the court enforced the revised order (Pet. App. 63a-65a).

(Pet. App. 56a, 62a). In any event, the court and the Commission correctly applied prevailing principles to the facts of this case.

1. Petitioner does not challenge Part A of the court's order. It contends (Pet. 12-18) that Parts B and C are overbroad because they require petitioner to make qualifying statements that petitioner claims are not necessary in all cases to make its representations non-misleading. Petitioner concedes that the Commission may condition the utterance of a misleading statement "upon the making of some appropriate additional statement without which [the original statement] will mislead" (Pet. 12),[7] but it argues that the additional statements required by Parts B and C are not necessary in all cases to prevent the unqualified representations from being misleading. This case therefore presents, according to petitioner, the question whether the Commission may require "truthful, nonmisleading commercial speech" (Pet. 9) to include statements about the views of persons with whom petitioner does not agree.

The case simply does not present such a question. The Commission found, and the court of appeals agreed, that petitioner's representations *are* misleading unless accompanied by additional information, and that finding was reasonably based on substantial evidence in the record. In view of the substantial body of medical evidence and opinion supporting the hypothesis that there is a positive correlation between the intake of dietary cholesterol and heart disease—which petitioner does not dispute—it was

[7]Thus petitioner recognizes that the First Amendment does not prohibit the government from regulating commercial advertising to ensure its truth and to prevent deception. See, *e.g.*, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 n. 24; *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 69 n. 31 (plurality opinion). That principle is not at issue here.

reasonable for the court and the Commission to conclude that any advertised statement concerning the relationship between dietary cholesterol and heart disease would be misleading in the absence of the qualification that there existed a controversy on the subject. The fact that the statement may be true in itself (*e.g.*, "Dr. X, Nobel Prize winner, stated today that eating eggs poses no risk of heart disease") is not significant in these circumstances; the Commission reasonably concluded that an unqualified statement on the merits of the cholesterol issue, or selective citations of authority supporting petitioner's side of the issue, tends to create the misleading impression that there is no significant controversy on the matter.[8] Similarly, the Commission and the court of appeals reasonably concluded that representations concerning the state of the evidence on the issue (*e.g.*, "10 recent studies have concluded that eating eggs poses no risk of heart disease") have the tendency to create a false impression unless qualified by a disclosure of the fact, established by the record, that many experts believe the evidence indicates otherwise.

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[8]See the Commission's statement at Pet. App. 36-37a: "[W]hen an advertiser, (or a 'National Commission on Egg Nutrition') which presumably knows everything there is to know about the product being discussed, assures the public that product is safe * * * the public will, and we think has a right to, assume that the advertiser is doing more than expressing an opinion that would at best obtain the qualified assent of a mere fraction of those professionally competent to evaluate it."

Petitioner errs in contending (Pet. 15-18) that the qualifying statements required by Parts B and C of the court's order are "corrective advertising" that may be sustained only on the basis of a finding that previous advertising had created a perseverent misimpression among the public on the merits of an issue. See *Warner-Lambert Co.* v. *Federal Trade Commission*, 562 F. 2d 749 (C.A. D.C.), certiorari denied, April 3, 1978 (Nos. 77-855 and 77-1118), where the Commission required Warner-Lambert to make a corrective statement whenever it advertised Listerine in order "to correct a widely held, mistaken belief which was cultivated by [Warner-Lambert's] past advertising." 562 F. 2d at 759 n. 52. Unlike the corrective statement required in *Warner-Lambert*, the qualifying statements required by Parts B and C of the court's order here are not designed to correct a mistaken belief cultivated by petitioner's past advertising, and they are not required whenever petitioner advertises eggs. Rather they are required only when petitioner makes certain specific representations, and they are required because they are necessary to prevent the deception that the Commission found would result from advertising those representations in the future without such qualifications. As such, they are the kind of qualifying statements that petitioner recognizes to be appriopriate and lawful when a representation without such qualifications would be misleading.[9]

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[9]The court of appeals' supplemental opinion stated that it is reasonable to assume that petitioner's past misleading advertising has some continuing effect among consumers (Pet. App. 64a), but the

2. Petitioner also contends (Pet. 18-21) that the qualifying statement required by Part C is unconstitutional because it allegedly "forces Petitioner to express an anti-egg position on the merits of the diet heart disease controversy" (Pet. 18).[10] That assertion is incorrect. The order permits petitioner to state any position on the merits of the controversy and to cite any studies to support that position, so long as it avoids making the statements prohibited by Part A of the order (which petitioner does not challenge).[11] That it also requires petitioner to disclose the fact, well established by the record, that many medical experts view the existing evidence differently does not force petitioner "to express an anti-egg position" or "utter an opinion it believes to be false" (Pet. 18, 20). Affirmative disclosure concerning controverted medical facts is quite appropriate. Petitioner cannot avoid its obligation to disclose information necessary to prevent deception simply by asserting that it disagrees with the thing to be disclosed. *J. B. Williams Co.* v. *Federal Trade Commission*, 381 F. 2d 884 (C.A. 6); *Ward Laboratories, Inc.* v. *Federal Trade Commission*, 276 F. 2d 952 (C.A. 2),

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court reiterated that "we are concerned *primarily* with preventing future deception" (Pet. App. 62a, 64a; emphasis by the court). Although the court was correct in stating that it is reasonable to assume some continuing effects from past advertising, and in observing that "[t]he past cannot be totally ignored" (Pet. App. 64a), petitioner is wrong in asserting that the "sole justification" (Pet. 15) for the decision here is the need to correct a misimpression created by past advertising.

[10]Petitioner calls this and its other arguments "overbreadth challenges" (*e.g.*, Pet. 12, 18, 21). This Court, however, has held that the "overbreadth doctrine" does not apply to commercial speech. *Ohralik* v. *Ohio State Bar Association*, No. 76-1650, decided May 30, 1978, slip op. 14-15 n. 20; *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 380-381.

[11]Indeed, the very reason the Commission modified the more restrictive prohibitions recommended by the administrative law judge was to permit petitioner to express its views on the merits of the controversy and to cite evidence supporting those views. See Pet. App. 39a and note 4, *supra*.

certiorari denied, 364 U.S. 827. If petitioner were right, any advertiser could frustrate the Commission simply by insisting on the position that its original statements were not misleading.

3. Petitioner's argument (Pet. 21-27) that the order is impermissibly vague is insubstanial. Petitioner's argument appears to be based primarily on the complaint that the Commission and the court of appeals failed to declare whether numerous hypothetical representations would come within the terms of the order or particular parts of it (see Pet. 22-27). Such declaratory advice is not the function of a cease and desist order; it is sufficient if the terms are clear enough "to avoid raising serious questions as to their meaning and application" (*Federal Trade Commission* v. *Henry Broch & Co.*, 368 U.S. 360, 367-368) and "are as specific as the circumstances will permit" (*Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 393). Moreover, as this Court stated in *Colgate-Palmolive*, *supra*, 380 U.S. at 394, if petitioner is "sincerely unable to determine whether a proposed course of action would violate the present order, [it] can, by complying with the Commission's rules, oblige the Commission to give [it] definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order" (footnote omitted). See 16 C.F.R. 3.61(d). See also *National Society of Professional Engineers* v. *United States*, No. 76-1767, decided April 25, 1978, slip op. 17-19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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